

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

<u>SUSAN REYNOLDS,</u>	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09cv11639-NG
	)	
<u>VHS TRANSPORTATION COMPANY, INC.,</u>	)	
Defendant.	)	
<u>GERTNER, D.J.:</u>		

**ORDER RE: MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE**

January 20, 2011

Plaintiff Susan Reynolds ("Reynolds"), a disabled individual suffering from ochronosis, worked for over six years at VHS Transportation Co. ("VHS") as a van driver transporting mentally disabled people from their homes in Scituate and Norwell, Massachusetts, to a program center located in Pembroke, Massachusetts. In April 2009, VHS fired Reynolds, explaining in her termination letter that this decision was "[i]n the interest of . . . safety." In response, Reynolds sued VHS, alleging under both the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101 et. seq., and Massachusetts' handicap discrimination statute, Mass. Gen. Laws ch. 151B, § 4(16), that VHS discriminated against her on the basis of her disability. She now moves for summary judgment (document #12). Under the ADA, which is identical to the state law for all intents and purposes in this case, an employer is prohibited from discriminating against "a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). As the statutory language makes clear, in order for an individual to be protected by the ADA against discrimination, she must be both "qualified" and "disabled." See, e.g., Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 32-33 (1st Cir. 2000). A person is "qualified" if "with or without reasonable accommodation, [she] can perform the essential functions of the employment position." 42 U.S.C. § 12111(8); see Ward, 209 F.3d

at 33. And it is the employee who bears the burden of showing that she meets this standard.

Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 25 (1st Cir. 2002). Taking the facts in the light most favorable to the defendant, as I must do at this stage, and given that Reynolds bears the burden, I cannot rule as a matter of law that Reynolds was qualified -- and thus protected by the ADA in this case -- since disputes remain with respect to material facts, including what exactly were Reynolds' essential functions and whether she could perform them with or without accommodation. As this issue of being "qualified" is a threshold matter, I need go no further. Reynolds, however, argues that, given the First Circuit's holding in EEOC v. Amego, 110 F.3d 135, 144 (1st Cir. 1997), the burden is on VHS to prove that Reynolds was not a threat to her passengers, since VHS evoked safety issues when terminating Reynolds, and that VHS cannot satisfy this burden. Reynolds grounds this argument in the fact that the "Defenses" section of the ADA indicates that it is not discrimination to fire someone who poses a "direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. § 12113(b), and defendants bear the burden of proof for affirmative defenses. This is not, however, just a case in which VHS has raised the "direct threat" issue when firing Reynolds, it is also a situation in which the safety of others was indisputably an essential function of Reynold's job, as articulated by VHS's Driver and Monitor Handbook, along with the Massachusetts Human Service Transportation ("HST") Coordination Initiative's Provider Performance Standards. Thus, the burden remains on Reynolds to prove that she could ensure the safety of her passengers -- either with or without accommodation -- in order to show that she could perform the essential functions of her job. Since the undisputed material facts do not enable Reynolds to satisfy this burden, her motion for summary judgment (**document #12**) is **DENIED**.

Reynolds has also moved to strike the pleadings defendant filed in opposition to plaintiff's Motion for Summary Judgment. While defendant may have at times "shrouded argument in the guise of statements of 'fact,'" Mercier v. Boilermakers Apprenticeship & Training Fund, No. 07-cv-11307-DPW, 2009 WL 458556, at \*9 (D. Mass. Feb. 10, 2009), I have considered the "facts" asserted by defendant only to the extent that they are supported by affidavits, depositions, and other documentation. See id.; LR, D. Mass. R. 56.1. Therefore, plaintiff's Motion to Strike is denied.

In conclusion, plaintiff's Motion for Summary Judgment (**document #12**) is **DENIED**. Similarly, plaintiff's Motion to Strike (**document #24**) is **DENIED**.

**SO ORDERED.**

**Date: January 20, 2011**

/s/ Nancy Gertner

**NANCY GERTNER, U.S.D.C.**